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Chapter 26: Employment Issues for Transgender and Gender Variant People: A Legal Perspective¹

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Overview

This chapter describes the recent development of laws protecting trans people against discrimination in Europe, and specifically focuses on legislation relating to employment issues for trans people in the United Kingdom. The Equality Act, which came into force in 2010 in the United Kingdom and provides protection from unlawful discrimination or harassment for everyone, including anyone belonging to a protected group such as trans people, is discussed as it relates to trans people.

Introduction

Recent years have seen a significant increase in the public presence of transsexual and transgender (trans) people in the workplace, in many parts of the world. Their colleagues are often surprised to discover that they are mostly much more ordinary people than those seen in many of the limited representations portrayed in the media in the past. Having said that, even the media is finally coming round to presenting a more realistic and nuanced presentation of trans lives.

Prior to the 2000s, trans people in the United Kingdom (UK) had little substantive protection from discrimination. In 1997, UK television's most popular soap, *Coronation Street*, showed workers harassing and bullying a transsexual woman out of her, fictional, job in a clothing factory, after they found out her past 'transsexual' history. Two years later, the 'wedding that never happened' for that same, most ordinary of transsexual women, *Coronation Street*'s café manager, Hayley Cropper (played by the non-trans actor Julie Hesmondhalgh), was a small but extremely significant part of the campaign that was to create a major social change in British life. As the public's previously

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complex attitude to the 'perverts who had sex changes' softened to the representation they saw on Coronation Street, it was merely the small beginnings of what were to become huge changes. They were all meeting increasing numbers of trans activists, ordinary trans people, who took part in the campaign of the pressure group Press For Change (PFC). These were the trans people who were deciding, finally, that they had done nothing to be ashamed of, and they had a right to stay, not just in their towns, but also in their jobs, whilst they progressed through their gender reassignment treatments.

Europe's trans people had formally obtained workplace protection in a decision of the Court of Justice of the European Union, in one of the first employment cases brought with the support of Press For Change (P v. S and Cornwall County Council [1996] Court of Justice of the European Union, Case C-13/94, IRLR 347). The Court had held that the use of gender rather than sex in the Equal Treatment (Gender) Directive was inclusive of those people who changed their gender, as well as those whose gender remained that attributed to them at birth.

However, there was not a will in government to support the decision in P v S. Just a few months before the public was to watch Coronation Street and discover that a trans woman, like Hayley Cropper, could not legally marry the man she loved, and who loved her, the UK Government held a consultation in which they proposed restricting the rights given by the decision of the Court of Justice. The consultation suggested that trans people would be barred from work with children, or where a person might be in a state of undress. At the stroke of a pen they were proposing the dismissal of youth workers, teachers, nursery staff, nurses, doctors and care workers. The final straw, however, was the proposal that trans people would only be allowed to use the toilet of their felt gender, once a senior manager determined they looked 'reasonable'. In less than the three weeks given to them to respond to the proposal, Press For Change managed to get over 800 individual letters written, not just by trans people, but also their families, their friends and, in some cases, their employers. The demand for employment rights for trans people reached government, well and truly, as it not only hit the desk of the responsible Minister in the Department of Work and Pensions, but also hundreds of constituency MPs and the Prime Minister. Employment protection would not, just as the trans people fighting back would not, be easily put back into the closet

The Trans Experience of the British Workplace

Twenty years of campaigning for 'Respect and Equality for All Trans People' by Press For Change was to culminate in 2010, when transgender and transsexual people were fully included as a group receiving protection from discrimination and harassment in the Equality Act 2010. The Act significantly clarified and expanded the protection afforded to trans people, and yet, despite that, recent research has demonstrated how many UK workplaces have not kept pace with the legal obligations now owed to their trans employees (Alexandra-Beauregard et al., 2016). A recent review of the annual reports of FTSE 100 firms, by the LGBT network OUTstanding, showed that trans people are not mentioned in the diversity policies of most these top UK firms; less than 20% of them had a trans-inclusive non-discrimination policy (Bentley, 2015). The results were neither surprising, nor unexpected by the researchers.

In a 1992 survey of 122 transsexual and transgender (trans) people, 35% were unemployed, with 43% claiming to have been forced to leave their employment after transitioning to live permanently in their felt gender role. Eight years later, in a 2000 survey with 208 trans respondents, only 9% were unemployed (the national rate was just five percent) and a further 8% were economically inactive, having a diagnosis of permanent disability. By then, protection from discrimination in employment on the grounds of gender reassignment had technically been in law for four years, since the decision in P v S. However, it was clear that it did not exist in practice, as still 16% of the respondents claimed they had been forced to leave their job (Whittle, 2002).

In 2007, after ten years of supposed legal protection at work, a survey of more than 800 trans people in the UK was to find that, after transition, 22% of respondents were required to use the toilets of their former gender role, or the disabled toilet, at work. Of the rest, almost all had had inappropriate comments made to them when using the toilet, and one third had received verbal abuse. Furthermore, at least 10% of those who transitioned whilst working, had been physically or verbally assaulted, such that, if they had made a complaint, a trial of the perpetrators could have resulted in a criminal conviction. Sadly, none of the respondents had reported the matter to the police. Only a very few had even spoken to their line manager (Whittle et al., 2007).

Twenty-five years after the 1992 survey, despite European Union and UK law now affording the most extensive workplace protection to trans people, they continue to experience workplace prejudice, discrimination and harassment. In 2011, the UK Government Equality Office's

Transgender Action Plan states that 88% of trans employees still experience discrimination or harassment in the workplace (Government Equalities Office, 2011). In 2015, the Women's and Equalities Committee of the House of Commons (HofC) said:

"Evidence, and legal opinion, that we received indicate that the protections are not universally seen as legally complete and many trans people still face discrimination in employment and in other aspects of their lives" (House of Commons Women and Equalities Committee, 2016).

The Value of Work to Trans People

Legal studies continue to focus on the trans persons' right to birth certificate change, their right to marry and the medico-legal issues of treatment and surgery. They are rarely concerned with employment rights protection for trans people, despite employment being probably the most important 'quality of life' issue for most adults (Alexandra-Beauregard et al., 2016).

A job, or lack of one, is of primary concern to most of us. Without a job, our place and status in our community is tenuous. Invariably, we are known by our job. As we meet new people, the first thing asked is '... and what do you do'. Many of us form our primary adult social contacts in the workplace and the financial rewards of our jobs allow us to enjoy those social contacts to the full. Our incomes also ensure our access to the consumer goods and services that, in their own turn, provide more jobs for others. Inevitably, it is by having paid employment that we are fully able to participate in our society (Little et al., 2002). A job becomes even more essential for members of the trans community if they wish to receive gender confirming treatments, including surgery(ies). Many clinicians still consider it key to a successful social transition for a trans person to be engaged in either full-time employment, full-time volunteer work, or full-time higher education. Many doctors have despaired when their best efforts at improving a trans patient's life quality are confounded by the prejudices of others in the field of employment. Paid employment also provides the financial resources that allow a person's access to treatments and surgery which continue to be difficult to access in a timely manner in many health services around the world. There are also those elements of physical body modification, such as hair removal, which continue to require self-funding in many countries (Whittle, 2008).

In reality, many employers have moved considerable distances in the years since the Court of Justice of the European Union decision in P v S. However, for many trans people, obtaining

employment and retaining it continues to be difficult. Gaining advancement is nigh on impossible. Many talk about the glass ceiling faced by women in the workplace; for most trans people in work, the ceiling is reinforced concrete.

The Equality Act 2010 and Trans People

The Equality Act 2010 in the UK provides a general ‘protection from unlawful discrimination or harassment or’ for anyone falling into, or perceived to be in, a protected group. One of these groups is people with the protected characteristic of gender reassignment (the Equality Act, s.7). The Equality Act outlines the characteristic as belonging to those people,

“proposing to undergo, ... undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex” (The Equality Act 2010 s.7(1)).

A criticism of the Act is that s.7 is couched in outdated language (House of Commons Women and Equalities Committee, 2016). Gender reassignment is not, of itself, defined by the Act other than through the words of section 7(1) and section 7(2) which states that,

“a transsexual person is ... a person who has the protected characteristic of gender reassignment” (The Equality Act 2010 s.7(2)).

The term ‘Transsexual’ originated as a medical concept and is nowadays used only to refer to those trans people who wish to undergo, or who are undergoing, or who have undergone, gender reassignment treatments, including surgical procedures to alter their body so it more closely resembles the body of someone born into the opposite sex group. Yet, the Guidance to the Equality Act 2010 indicates that transsexual people undergoing medical gender reassignment are not the only trans people provided protection by the Act. The explanatory notes to the Act, clarify that the Act “*no longer requir(es) a person who falls under section 7, to be under medical supervision*” (The Equality Act 2010 Explanatory Notes, Commentary on Sections: Pt 2, Ch. 1, S.7, para 43). Consequently, “*gender reassignment is now a personal, social, and sometimes medical process*” (The Highland Council Members’ Equalities Working Group, 2011). Despite that, in the examples given in the Guidance, the people protected by s.7 are all people who, at least, intend to change to living in the gender role opposite to that assigned at birth.

The Equality Act 2010 and Non-Binary or Non-Gendered People

People who do not experience their personal gender identity as being either both genders (referred to as non-binary trans people) or either one of the two genders (non-gendered people), currently feel uncertain about whether the Equality Act would protect them from discrimination. Many non-binary people do transition to living apparently as a person of the gender opposite to that ascribed to them at birth. Non-gendered people usually develop a much more uncertain presentation of identity, which, to the outside observer, is often seen as androgynous. This, particularly, makes gaining employment a virtual impossibility (Elan Cane, 2015, Response to q.182). Non-binary and non-gendered people argue that they are unable to ‘come out’ in the workplace, as doing so would disadvantage them by removing their protection from discrimination. Consequently, society gets a distorted perception of how many people feel their gender identity is one of having parts of ‘both a man and a woman’, or of being neither. Non-binary and non-gendered people argue that the wording of both the Act and the Guidance to the Act is too vague. The language is undoubtedly outdated, and, as the HofC Women’s and Equality Committee put it,

“there is a consequent, apparently widespread, misapprehension that the Act only provides protection to those trans people whose transition involves medical “gender-reassignment” treatment”. Likewise, “transsexual”, being primarily a medical categorisation, can be seen as referring specifically to someone who intends to undergo, is undergoing, or has undergone, such a medical intervention) (HofC Women’s and Equality Committee, 2016, 24 para 93).

During the Inquiry of the Women’s and Equality Committee, the Minister, Caroline Dinenage from the Ministry of Justice, clarified that a previous, rather blunt departmental response to an online petition by non-binary people, had meant to say that,

“there is no specific detriment experienced by people who identify as non-binary *that is not already covered by existing legislation*” (HofC Women’s and Equality Committee, 2016, 25 para 99).

She went on to say that non-binary and non-gendered people, not directly covered under s.7, may be covered under the ‘discrimination-by-perception’ provisions (see 6.1.2. below) contained within s.13 of the Act 2010. Alternatively, she went on, they may have protection from discrimination within other areas of employment law (presumably unfair dismissal), Human Rights Law, or Hate

Crime Law (HofC Women's and Equality Committee, 2016, 25 para 100). However, without further exposition, what is meant in law by the phrases 'non-binary' or 'non-gendered' is not at all clear.

The HofC Women's and Equality Committee agreed with the suggestions made by Press for Change during the consultation period for the Equality Act 2010, that use of,

"the terms 'gender reassignment' and 'transsexual' in the Act are outdated and misleading; and may not cover wider members of the trans community. The protected characteristic should be amended to that of 'gender identity'."

The Workplace, Gender Roles, and Dress Codes

Despite guidance clarifying that gender reassignment is now a social process, and 'only sometimes' a medical process, the examples given in the Guidance imply a person will, at least, intend to transition to living in the gender role opposite to that ascribed at birth (the Equality Act 2010 Explanatory Notes, Commentary on Sections: Pt 2, Ch. 1, S.7, para.43). The question as to whether that is the minimal limit, however, has not been tested in court. This leaves a big question mark. Will the Act protect a person who manifestly is not changing to living in the 'opposite' gender role? What if a man goes to work wearing a dress, but is still being a man, i.e. a person merely wishing to adopt aspects of manner or dress that are clearly associated in the minds of most gender normative people as belonging to a person of the opposite sex. Normative rules regarding dress are still extremely common, particularly in the workplace. They can range from the:

"explicit and formal dress codes that are written and detailed and often included in employee handbooks to implicit, often unwritten, norms that are sometimes mentioned at recruitment and selection stages and overseen by line managers" (Nath, 2016).

The Employment Appeal Tribunal has held that it was not discrimination when an employer refused a bisexual male transvestite, who was not seeking gender reassignment treatments, permission to wear female clothing in work. The applicant claimed that he wore the female clothing to express the innate feminine aspects of his personality and, anyway, he did not meet the business's clients, customers or the public when working. It was held that an employer can reasonably determine what is appropriate dress in a "business-like organisation", so as to avoid having the business brought into disrepute (*Kara v. Hackney Council* [1995] EAT, case 325/95). The applicant attempted

to have his case heard at the European Court of Human Rights, but his case was declared inadmissible, as,

“the rules as to the mode of dress at work affected the applicant during work hours on work premises and ... at other times he remained at liberty to dress as he wished” (Kara v the United Kingdom, Commission of the European Convention on Human Rights [1997] application no: 36528/97).

Twenty years later, after many trans-positive decisions of the Court of Human Rights, one does wonder whether the Court would now decide differently. Connolly (2011) has argued that, before dress codes can be challenged on the grounds of sex or gender discrimination (rather than gender reassignment discrimination), they must place more of a burden upon people of that sex. As a rule, the English courts take an ‘in the round’ view of workplace dress codes; restrictions on clothing appearance do not have to be identical for both sexes so long as they are “*imposed to an equal degree*” (Smith and Baker, 2013).

On the direct question, of cross-dressing, that is wearing clothing associated with members of the opposite sex, ACAS* guidance is that, whilst Employer’s Dress codes, which can include normative practice, must apply to both men and women equally, they may have different requirements (Nath, 2016). This is clearly problematic. Who gets to decide whether dress code requirements are equally burdensome? In workplaces traditionally divided between the sexes, such as the motor industry, how can we compare a requirement of the men who are mechanics to wear steel-capped safety boots, with a requirement of women who are receptionists to wear high heels? The first is for safety reasons; the second is for ...? Restrictive dress codes, and the failure to recognise non-gendered and non binary people are all part of the same malaise. Current law continues to allow internal policies to promote normative gender stereotyping throughout many employment sectors. A principle of law is that it should be clear and able to be understood by ordinary people. Individuals should not have to engage in taking test cases to the Courts to clarify what their legal position is under law, when they are simply trying to get dressed for work.

Employer’s Obligations under the Equality Act 2010

It is the duty of all employers to ensure non-discrimination in all workplace practices, so as to protect trans employees, or other trans workers (including volunteers) from unlawful

discrimination, which is to their detriment. The provisions of the Equality Act 2010 state an employer's obligations, not just to an individual trans employee, but to any and all trans people, including sub-contractors, service users, clients and customers. Employers must ensure that all of their employees are aware of the employer's obligations under the Act. They must provide training so that their workforce is able to ensure that trans people who are fellow employees, contractors, or customers, clients, or service users of the employers, are treated in accordance with the law.

An employer's obligations to an individual trans employee arises at the point when a person informs their employer that:

- They are intending to undergo, or
- They are undergoing, or
- They have undergone

gender reassignment.

The Equality Act 2010: Defined Types of Discrimination

Section 13, Direct Discrimination

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others (Equality Act, Part 1, s.13.1). Direct discrimination occurs when a person is treated differently, to their detriment, as compared to others. The Act affords protection from direct discrimination that takes place because a person is trans. For example,

- Refusing to consider appointing a person to a post,
- Refusing to consider promoting a person,
- Always giving a person the worst work,

Always giving the person fewer working hours, or a lower rate of pay solely because they are trans, is unlawful discrimination. Though the Act is quite clear on this, a problem arises where an Employer's industry has a very high 'wealth base', and continues to discriminate, because they do not care that they may have to pay compensation. The levels of compensation for discrimination are too low, being restricted to (money lost) plus (£5000 or less) for hurt feelings. The occasional

large pay-out trumpeted by the tabloid press only exists when a victim experiences additional damage, such as developing a consequent, serious, long term, psychiatric illness.

Association

The phrase in s.13; “because of a protected characteristic” extends the direct discrimination protection to include any situation when a person (trans or not) is treated unfavourably because they are in some way associated with a trans person. It might be that they are a friend, a relative, or simply a co-worker, customer or service user who has objected to other staff speaking badly about a trans person.

Perception

Similarly, s.13 affords protection to a person who is not trans, but who is perceived as being trans, and consequently experiences prejudice and discrimination. This is often seen as how cross-dressers, non-binary, non-gendered or some people with intersex conditions can bring a claim for discrimination. But it will not be of any help if the discriminator can assert they know that the victim is a person not intending to undergo, nor undergoing, nor having undergone gender reassignment.

Section 19, Indirect Discrimination

The Equality Act 2010 s.19 provides protection to trans people from indirect discrimination. Indirect discrimination means:

- putting in place a rule, or policy, or a way of doing things, that has
- a detrimental impact on someone who is trans, or
- makes it more difficult for a trans person to seek or continue their employment,

when this cannot be objectively justified.

Historically, the classic indirect discrimination rule was requiring police officers to be a certain height. Not only did it prevent many women from becoming police officers, but because of the height differentials between the ‘sexes’ in the past, trans men would almost certainly have been unable to become police officers. Fortunately, that rule no longer exists, and many trans men and women now work as police or fire officers.

Examples of indirect discrimination that could disadvantage transgender women today would be workplace policies that say:

- Female staff cannot wear wigs, hats or scarves in the workplace.
- Female staff cannot wear makeup in the workplace.
- Staff are only able to take a maximum ten days of sick leave per year, including in-hospital stays.

These policies would potentially be indirect discrimination, as they would clearly disadvantage trans women who may have to wear a wig or makeup to successfully look like a woman, and the last would disadvantage any trans person intending to undergo gender reassignment surgery(ies).

Employers have tried to show that there is an objective need for these policies, e.g. in the case of makeup, it was not allowed in a workplace because of the risk of contamination in a sterile laboratory setting. However, the law does not allow a defence of legitimate need against direct or indirect discrimination; rather it requires the employer to adapt to the needs of the trans employees. In the case of the sterile setting, the employer should have given consideration to allowing the trans person to work in another part of the business.

Section 26, Harassment

The Equality Act 2010, s.26 affords protection from harassment across the protected categories, and employers and businesses have an obligation to protect their workers, customers, clients, and service users from harassment by their staff. Harassment includes any unwanted conduct related to a person's status which has:

- the purpose or effect of violating their dignity, or
- creating a hostile, degrading, humiliating or offensive environment.

For trans people, this includes:

- allowing repeated, albeit petty, derogatory remarks, about 'sex changes',
- failing to call a trans person by their preferred name,
- failing to use the correct gender pronouns for a trans person,
- putting news articles, posters / pictures or similar which 'joke' about trans people, on a notice board,

- making sexual comments about a trans person. This would include failing to stop fellow staff, customers, clients, or service users asking a trans people about their surgery and/or their genitals. This conduct is clearly not acceptable and, if it takes place more than once, it could amount to harassment.

In Chessington World of Adventures Ltd v Reed [1997] EAT, IRLR 556 placing a small coffin, and used tampons, on the work bench of a trans woman amounted to unlawful harassment.

Section 27, Victimisation

The Equality Act s.27 protects trans people, and people associated with them, from victimisation in the workplace. Victimisation occurs:

- when a trans person is treated unfavourably because they have taken, or might take a 'protected' action (bring a complaint) under the Equality Act 2010, or
- when a person, who is associated with a trans person, is treated unfavourably because they are supporting a trans person who has taken, or might take a 'protected' action under the Act.

A 'protected' action under the Equality Act 2010 can be:

- complaining about discrimination, harassment or victimisation, or
- taking a claim to a Tribunal about discrimination, harassment or victimisation.

Section 16, Absences from Work due to Gender Reassignment

The Equality Act 2010 s.16 protects a trans person from being treated differently because they are required to be absent from work for their gender reassignment treatments and surgeries. This also ensures that employers provide the time needed for treatments. This provision can be combined with other elements of Employment Law, such as direct discrimination, unfair dismissal or unfair redundancy. For example, many employers now 'limit' the time staff can take as sickness absence each year, and if they go over that time, they will be considered for dismissal due to 'incapacity'.

The Equality Act 2010 s.16 makes it quite clear that, if a person is being absent for gender reassignment treatments or surgeries, the use of a 'time limit', after which they will be deemed to not have the capacity to do their job, will be unlawful.

Section 60, Pre-Employment Medical Questionnaires or Assessments

In the past, people with disabilities, a medical history of mental illness, or other persistent health problems, and trans people, frequently found it difficult to obtain employment or vocational training because of the use of pre-employment medicals or medical questionnaires. Employers used them to screen out job applicants. Trans people would successfully pass the initial testing and interview stages to study medicine or teacher training, but, on attending for a medical assessment, would be refused a 'pass' because people like them were not welcome in professional jobs (and many non-professional jobs). Alternatively, if they did not disclose their past or current gender reassignment treatment and, if at some later stage their trans status was discovered, they would be dismissed for not being truthful at the time of their application. Section 60 of the Equality Act 2010 makes it generally unlawful for a job applicant to be asked questions about their health or disability before they are offered a job. An employer cannot refer an applicant to an occupational health practitioner, or ask an applicant to fill in a questionnaire provided by an occupational health practitioner, before a job offer is made. The UK's Commission for Equality and Human Rights has the power to take legal action against employers who persist in using pre-employment medical examinations or questionnaires. Individuals may bring a successful claim of discrimination if they are asked to take part in any form of medical assessment prior to being appointed to a position.

However, an employer can ask any job or training applicant about their health or disability, after the applicant has been offered a position. There are rules, though, about when and how this can be done. Firstly, when holding a bulk recruitment exercise, the restriction on questions about health or disability only applies up to the point where an applicant has been placed in a pool of successful applicants who are to be offered jobs as vacancies arise. In these circumstances, a trans person may have to make a claim for direct discrimination if the offer is then withdrawn. An employer would then need to successfully defend this by arguing, either that they were not appointing because of prior health conditions, or there was a legitimate need for health based restrictions. However, although not yet tested in court, an employer would then need to demonstrate a real, proportionate, and legitimate need for the medical questionnaire. Because they 'like to do it' would be insufficient.

If the employer is a public authority, i.e. an emanation of the state, a medical questionnaire or other requirement could contravene a trans person's right to privacy (see s.7.1. below) as regards

their personal medical history (Goodwin and I v the UK Government [2002] ECHR, Apps Nos. 28957/95 and 25608/94). Clearly, the further in time they are away from, for example, a previous mental illness related to the stigma of being trans, or prior gender reassignment treatments, the more likely those medical details will be judged to be irrelevant to an employer's 'need to know'.

Secondly, medical questionnaires may be used positively. For example, an employer can use a questionnaire to determine whether applicants with disabilities require specific support to take part in a job application process. Employers can also use a medical evaluation process to determine whether a successful disabled candidate would benefit from being referred to an occupational health practitioner to explore whether and what reasonable adjustments may help them settle into the job and do well. This is lawful.

Thirdly, medical questions may also be used pre-appointment, for example at interview, to investigate the integrity and reliability of an applicant, for example:

- involvement in illegal activities;
- unspent criminal convictions relevant to the role, particularly if not volunteered by the applicant and only revealed by other checks;
- false or unsubstantiated claims on the CV or application form;
- unsubstantiated qualifications;
- unexplained gaps in employment history;
- adverse references;
- questionable documentation, e.g. lack of supporting paperwork or concern that documents are not genuine; or
- evasiveness or unwillingness to provide information on the part of the candidate.

In the UK, whilst pre-employment screening can be used only in a limited way, post-employment screening MUST be used to confirm an applicant's identity, nationality and immigration status to ensure they have the right to work in the UK. This can cause problems for immigrant trans people, whose passports do not reflect their personal history. They may need to contact the UK Immigration Advice service to obtain a separate 'permission to work in the UK' certificate.

The Public Sector General Equality Duty

Public Sector Bodies (PSBs) are those organisations which are part of government, or of local authorities, or those bodies in receipt of state funding to perform an act of the state. The Public Sector General Equality duty contained within the Equality Act 2010 requires all Public Sector Bodies to give due regard to:

- Eliminating unlawful discrimination, harassment and victimisation, including towards trans people;
- Advancing equality of opportunity between different groups, including trans people;
- Fostering good relations between different groups, including trans people.

They should do this by giving due regard to:

- Removing or minimising disadvantages suffered, that are connected to them being trans;
- Taking steps to meet the needs of trans people, which are different from the needs of persons who are not trans;
- Encouraging trans persons to participate in public life, or in any other activity in which participation by such persons is disproportionately low.

Public Sector Employers and the Human Rights Act 1998

There are further legal requirements placed upon all employers who are PSBs or who are doing the work of a Public Authority. These are legal obligations of the state and arise through the Human Rights Act 1998, which embodies the European Convention of Human Rights into UK law. Human Rights are individual rights that are held by virtue of residence in a state which is a signatory of the United Nations Declaration of Human Rights and the European Convention on Human Rights.

Human Rights are rights that can be claimed against the state or any organisations that are an emanation of the state, which includes government departments, local authorities, and other PSBs, including NHS health services, state funded schools, colleges and universities. PSBs must ensure that what they do, does not contravene the individual human rights of their employees. A broad description of the full range of human rights that each person resident in the UK, including children, has under the Human Rights Act 1998 and the European Convention, is referred to as the FREDA Principles. These require a person be treated,

- Fairly, with
- Respect and

- Dignity at all times, so as to afford effective
- Equality, whilst recognising their right to their
- Autonomy as to their personal development and identity.

The FREDA Principles inform our understanding of the obligations of PSBs under the Human Rights Act 1998, and are a useful tool in determining whether a PSB has contravened a person's human rights. However, trans people have also had specific rights, under the European Convention on Human Rights, upheld in cases before the European Court of Human Rights, notably a right of privacy for their past medical history, and their previous name and sex (Goodwin and I v the UK Government [2002] ECHR, Apps Nos. 28957/95 and 25608/94).

Section 22 of the Gender Recognition Act 2004 obliges employers to ensure that all trans people, who have obtained recognition of their preferred gender, are afforded privacy for all legal purposes. This means all records should be revisited, and retracted wherever they might disclose that an employee, who has a Gender Recognition Certificate, was previously of another name and (birth) sex.

LEARNING POINTS

- Europe's trans people had formally obtained workplace protection in a decision of the Court of Justice of the European Union in one of the first employment cases brought with the support of Press For Change (PFC – www.pfc.org.uk) in 1996.
- Employment protections for trans people in the UK were greatly enhanced with the introduction of the Equality Act 2010, but there are still significant problems experienced by many trans people.
- Bringing cases to court is not necessarily in the best interest of trans people, as related publicity could cause them even more harm.
- The courts have recognised the need to protect trans people from unwanted reporting of their personal details and, increasingly, when trans people do make their claims in the courts, they are being successful.

- The Equality Act 2010 has also enabled the legal education of employers and, with negotiation, it is frequently possible to see the creation of new, trans friendly workplace policies, and the retention of a person's job.
- Keeping one's employment, even in the short term, will usually be of far more economic and social value to a trans person than the small amounts of compensation the courts make payable for discrimination or harassment.

References

Alexandra-Beauregard, T., Arevshatian, L., Booth, J.E., & Whittle, S. (2016). Listen carefully: transgender voices in the workplace, *The International Journal of Human Resource Management*.

Bentley, N. (2015). Are businesses really flying the flag for LGBT inclusion? In *Huffington Post UK*. , August 18, acc 27/10/2015 at http://www.huffingtonpost.co.uk/neil-bentley/businesses-lgbt-inclusion_b_8004434.html?utm_hp_ref=tw

Connolly, M. (2011). *Discrimination Law*. London: Sweet and Maxwell.

Elan-Cane, C. (2015). Oral evidence: Transgender Equality Inquiry, HC 390, Tuesday 13 October, London: House of Commons, acc. 12/12/15 at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/transgender-equality/oral/23159.html>

Government Equalities Office (2011). *Advancing transgender equality: A plan for action*. HMSO: London.

House of Commons Women's and Equality Committee (2016). *Transgender Equality: First Report of Session 2015–16*. London: House of Commons.

Little, C., Stephens, P., Whittle, S. (2002). The Praxis and Politics of Policing: Problems Facing Transgender People. *QUT Law & Justice Journal*, 2(2), 226-243.

Nath, V. (2016). *Dress codes and appearance at work: Body supplements, Body modification, and aesthetic labour*. Ref: 07/16. London: ACAS.

Smith, I., & Baker, A., (2013). *Smith and Wood Employment Law*. Oxford: Oxford UP.

The Highland Council Members' Equalities Working Group (2011). *Briefing on Gender Reassignment and the Equality Act 2010*. Report by Assistant Chief Executive. Inverness: The Highland Council.

Accessed 10/11/2012 at www.highland.gov.uk/download/meetings/id/45236/item5ewg911pdf

Whittle, S. (2001). *Employment Discrimination and Transsexual People*. Ashted, Surrey: GIRES.

Accessed 12/02/2005 at <http://www.gires.org.uk/Text Assets/Employment Disc Full Paper.pdf>

Whittle, S., Turner, L., & Alami, M. (2007). *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*. London: Cabinet Office

Whittle, S., Turner, L., Combs, R., and Rhodes, S. (2008). *Transgender EuroStudy: Legal Survey and Focus on the Transgender Experience of Health Care*. Brussels: ILGA Europe